FILE COPY

APR 24 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1425

BROADRIVER, INCORPORATED,

Petitioner,

—v.—

CITY OF STAMFORD, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

JULIUS B. KURIANSKY
25 Bank Street
Stamford, Connecticut 06901
Attorney for Petitioner

BLEED THROUGH POOR COPY

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions, Statutes and Regulations Involved	3
Statement of the Case	3
Reasons for Granting the Writ	5
Conclusion	15
Appendix A—Constitutional Provisions, Statutes and Regulations Cited	17
Appendix B—Judgment and Proceedings Below	23

Table of Authorities Cited

Cases:

Cincinnati v. Vester (CA 6), 33 F.2d 342, affd. 281 U.S. 439	14
Cole v. La Grange, 113 U.S. 1	14
Colon v. Tompkins Square Neighbors, Inc., 294 F. Supp. 134, 138	7
Henry Ford & Son v. Little Falls Fibre Co., 280 U.S. 369	14
Hobson v. Hobsen, 269 F. Supp. 401, 497	11

PAGE

Madisonville Traction Co. v. St. Bernard Min. Co., 196 U.S. 239 14
McLaughlin v. Florida, 379 U.S. 184, 190 8
Missouri Pacific Railway Company v. Nebraska, 164 U.S. 403 9

North Carolina Pub. Serv. Co. v. Southern Power Co. (CA 4), 282 F. 837, cert. dismd. 263 U.S. 508 14
Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920, 931 ..... 7, 11

United States v. Central Eureka Mining Co., 357 U.S. 155 14
Utah Power and Light Co. v. United States, 253 U.S. 389 14

Wilkinson v. Leland, 2 Pet. (U.S.) 627 14

Statutes:

Connecticut General Statutes, Sec. 8-129 ..... 2, 3, 12, 13

Constitutional Provisions 2, 3, 5, 7, 8, 12, 14

BLEED THROUGH POOR COPY

In the

Supreme Court of the United States

October Term, 1969

No. .....

Broadriver, Incorporated,

Petitioner,

—v.—

City of Stamford, *et al.*,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

Petitioner Broadriver, Incorporated prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered on December 3, 1969.

Opinions Below

The opinion of the Supreme Court of the State of Connecticut is reported at 158 Conn. 522, —— Atl.2d ——.

Jurisdiction

The Connecticut Supreme Court entered judgment on December 3, 1969, and the decision was announced on December 23, 1969. Petitioner's motion to reargue was denied on January 15, 1970.

The jurisdiction of this Court is conferred by 28 U.S.C. Sec. 1257(3).

Questions Presented

1. A City and an Urban Redevelopment Commission cause a vast area of a city to be condemned and give preference to one individual to purchase and develop the properties in this area, to the exclusion of others, including owners of parcels in the area who are willing to develop their parcels in accordance with renewal standards. Is it an unlawful taking in violation of the equal protection and due process clause of the Fourteenth Amendment and a public taking for a private purpose, to grant and continue giving this preference to this one individual pursuant to an agreement between the Urban Redevelopment Commission and this individual which is patently illusory and void, as a result of which this individual is not bound by any legally enforceable obligation to the City or the Urban Redevelopment Commission, where this preference is continued, to the exclusion of others, for an uninterrupted period of six and one-half years, during the entire time of which this individual neither purchases nor agrees to purchase any of the property in the redevelopment area?

2. Where under Connecticut General Statutes § 8-129, petitioner's property was taken and title transferred to respondents, despite petitioner's present suit to prevent the taking as one for a private rather than a public purpose, and as violative of the due process and equal protection clause of the Fourteenth Amendment, was this taking a violation thereof?

Constitutional Provisions, Statutes and Regulations Involved

Section 8-129, Connecticut General Statutes Revision of 1958 is set out in the Appendix, *infra,* p. 17.

Section 8-137, Connecticut General Statutes Revision of 1958 is set out in the Appendix, *infra,* p. 20.

Fourteenth Amendment, United States Constitution is set out in the Appendix, p. 17.

Statement of the Case

The plaintiff is the owner of a tract of land located on the southeast corner of Broad and River Streets in Stamford, Connecticut. On July 14, 1966, acting pursuant to § 8-129 of the Connecticut General Statutes, the defendant Urban Redevelopment Commission, a public agency of the City of Stamford, caused to be served upon the plaintiff and filed with the defendant Clerk of the Superior Court at Stamford a "Notice of Taking" and a "Statement of Compensation" (Lis Pendens) covering the plaintiff's property. More than six months later, on February 1, 1967, the Clerk issued a Certificate of Taking, which Certificate was recorded in the Stamford Town Clerk's Office, and, since that date, the defendant City claims to be the fee simple owner of the plaintiff's premises.

A plan for the redevelopment of a portion of the City of Stamford, known as the "Southeast Quadrant Redevelopment Plan Extended," the text of which is in evidence as Exhibit K, had been adopted by the Board of Representatives of the City of Stamford in March, 1963.

On January 27, 1960, the defendant Urban Redevelopment Commission entered into an "Agreement" with Seon Pierre Bonan and The F. D. Rich Co., Incorporated, the so-called preselected sponsors of the redevelopment project. The "Agreement" contemplated that a disposition contract would be entered into between the defendant Urban Redevelopment Commission and the preselected sponsors, but, as of the date of trial, no such contract had been executed by the parties.

Mrs. Dwight Marshall is, and for approximately five years prior to the trial had been Chairman of the defendant Commission. Dr. Arthur Koffler is President of the plaintiff corporation. In May of 1966, Dr. Koffler and Mrs. Marshall arranged a conference at the office of the Urban Redevelopment Commission to discuss the proposed condemnation of the plaintiff's land. Present at this meeting, in addition to Mrs. Marshall and Dr. Koffler, were George A. McCulloch, Redevelopment Co-ordinator and Director for the defendant Commission; Eugene D. Jones, Project Manager for Frederick R. Harris Associates, the Co-ordinating Engineers retained by the defendant Commission; and Attorney Sydney C. Kweskin, representing the plaintiff. Mrs. Marshall advised Dr. Koffler that the Commission would require for the redevelopment plan only so much of the plaintiff's property as was necessary to widen River Street and that it would be willing to relinquish the balance of the property from development by the sponsors, provided that the preselected sponsors would give their consent. Mrs. Marshall also advised Dr. Koffler that if it were agreeable with the preselected sponsors, the Commission would be willing to permit the plaintiff to develop its property together with the abutting Urbanowicz parcel

BLEED THROUGH POOR COPY

as a joint venture with the sponsors. Mr. McCulloch set up an appointment with the preselected sponsors on behalf of Dr. Koffler. Subsequently, Dr. Koffler conferred with a representative of the preselected sponsors, Robert Rich, who refused to relinquish the sponsors' claimed interest in any portion of the plaintiff's property or the Urbanowics parcel.

Shortly after the institution of the within action the plaintiff sought a temporary injunction to restrain the defendants from acquiring its land and buildings. The restraining order was denied. The plaintiff's request for a permanent injunction and claim for a declaratory judgment were decided in favor of the defendants, and the within appeal ensued.

Reasons for Granting the Writ

A. Certiorari should be granted to decide whether the taking of petitioner's property is in violation of the equal protection and due process clause of the Fourteenth Amendment, and a public taking for a private purpose and thus violates the due process clause of the Fourteenth Amendment.

This case presents vital constitutional questions not heretofore determined by this court, and important questions of broad practical significance.

On June 30, 1969, there were 2,583 Urban Renewal Projects approved for Federal Assistance throughout the United States under Title 1 of the Housing Act of 1949, as amended; and Federal grants for Urban Renewal Projects totalled the immense sum of $7,859,049,000.00. It is therefore evident that Urban Renewal Projects have a vast and incalculable impact on society, both in the governmental and private sector. See Urban Renewal Directory, June 30, 1969, U. S. Department of Housing and Urban

Development, Table 1. The questions raised by the actions of urban redevelopment commissions thus affect the lives and property of a substantial segment of our population in a most drastic, fundamental and final manner.

On January 27, 1960, an agreement was entered into between the Urban Redevelopment Commission of the City of Stamford, Connecticut, on the one hand, and F. D. Rich Co., Incorporated, and Seon Pierre Bonan, on the other, referred to as the redeveloper. This agreement was patently illusory and void. Six and one-half years later, specifically on July 14, 1966, the Commission served a notice of taking upon petitioner, for the purpose of condemning its land. The Commission asserted that at that time, and at all times prior thereto, it was acting pursuant to the aforesaid agreement, which the Commission stated granted to the redeveloper a right of first refusal. Although this illusory and void agreement indicated that a subsequent contract would be entered into between the Commission and the redeveloper, under which the latter would actually agree to purchase land in the area, no such contract had been entered into between them at the time of taking of petitioner's land. In fact, during this entire period of six and one-half years the redeveloper neither purchased nor contracted to purchase one inch of land in the vast redevelopment area. Yet, after this very extended period of time, petitioner was not permitted to redevelop its land, although it was willing to do so in accordance with renewal standards, and petitioner's land was condemned, the Commission asserting that this so-called redeveloper had a right of first refusal.

It has been held that an Urban Redevelopment Commission may use private enterprise for redevelopment of an

area. This is, however, no authority for the proposition that every type of relationship may be properly entered into and pursued between a redevelopment commission and a redeveloper. Certainly a redevelopment commission may not deal with a redeveloper in such a manner as to deprive others who own land in the redevelopment area of equal protection or due process under the Fourteenth Amendment of the Constitution of the United States.

The United States Court of Appeals, Second Circuit, in dealing with the actions of a redevelopment commission in *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F.2d 920, considered the practice of a commission relating to relocation of displacees. Although the commission admittedly had authority to displace and relocate inhabitants in the area in a proper and authorized manner, the court held that it could be found that the commission had in fact exercised this authority with respect to petitioning displacees, in a manner that was violative of the equal protection guarantees of the United States Constitution.

So, in the instant case, where the Commission admittedly had authority to deal with a redeveloper in a proper and authorized manner, to the exclusion of a landowner, the Commission in fact exercised this authority, with respect to a petitioning landowner, in a manner that was violative of the equal protection guarantees of the United States Constitution.

It is established that the Equal Protection Clause of the United States Constitution is satisfied only when a classification rests ". . . upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed . . ." *Colon* v. *Tompkins*

Square Neighbors, Inc., 294 F. Supp. 134, 138, citing *McLaughlin* v. *Florida*, 379 U.S. 184, 190.

In the instant case there was no such reasonable or just basis for permitting this so-called redeveloper to have a right of first refusal with respect to petitioner's land, which petitioner was prepared to develop in accordance with renewal standards. Under these circumstances, equal protection required that petitioner be given the opportunity to develop its own land. The so-called redeveloper, having executed only an illusory and void agreement, had not been legally obligated to perform for a period of six and one-half years, during all of which time the Commission had given the redeveloper the preferential right of first refusal with respect to land in the redevelopment area; and during all of this time the redeveloper had neither contracted to purchase, nor purchased, any land in the area. Whatever might have been the situation if the relationship and course of conduct between the commission and redeveloper had been otherwise during these six and one-half years, the fact is, that at the time the Commission condemned petitioner's land, with a preference granted to this redeveloper, the Commission was acting in a discriminatory manner in derogation of petitioner's right to equal protection. To hold otherwise would be to give a commission the power to discriminate, without reasonable and just basis for classification, a power which it cannot have.

As petitioner's land has been taken in violation of its right to equal protection, petitioner has been deprived of property without due process of law under the 14th Amendment of the United States Constitution. Furthermore, while a taking for redevelopment can be for a public use, yet, in the instant case, in view of the circumstances and

course of conduct between the commission and the redeveloper, this taking for the purpose of benefiting the redeveloper can be deemed as in fact a taking for a private, rather than a public use. A public taking of private property for a private use is in violation of the due process clause of the 14th Amendment. *Missouri Pacific Railway Company* v. *Nebraska,* 164 U.S. 403.

The Supreme Court of Connecticut erred, when in granting judgment for defendant, it stated with reference to the aforesaid agreement of January 27, 1960, between the Redevelopment Commission of the City of Stamford, Connecticut, and F. D. Rich Co., Incorporated and Seon Pierre Bonan:

> "It is unnecessary to elaborate upon the details of the contract between the commission and the redeveloper which the plaintiff claims is illusory and void. It is sufficient to say that a lengthy instrument had been executed between the commission and Seon Pierre Bonan and the F. D. Rich Company, Inc. as redevelopers, which the commission asserts to be a valid and binding contract looking to the performance, by the redevelopers, of various preliminary obligations and the ultimate purchase, for redevelopment, of properties acquired by the commission."

It is not the Commission's assertion that the contract is valid and binding that is determinative of the issue, but rather whether, as a matter of law, the contract is valid and binding.

It should be noted that the trial court also would not meet the petitioner's claim that the contract was void.

Paragraph 6 of this agreement, the full text of which appears in Exhibit I. of Connecticut Supreme Court Record, reads as follows:

> "Upon submission of a Plan satisfactory to the Commission and such City officials and agencies as the Commission may indicate, the Redevelopers shall, within thirty (30) days of written notice from the Commission of approval of the Plan by all necessary local agencies and the Housing and Home Finance Agency enter into a contract to purchase from the Commission, after acquisition, demolition, and installation of those site improvements which are to be installed by the City, all the land in the area available to the Commission for sale for private development for cash at a price mutually agreeable to the parties hereto determined by sound appraisal practices, and approved by City agencies and officials and the Federal government, and in substantial accord with the conditions, restrictions, and limitations of a standard form of disposition contract as found in Federal Housing and Home Finance Agency Form H-6209 'Guide Form of Contract for Disposition of Land for Private Redevelopment' . . ."

The provision that a contract shall be entered into for cash "at a price mutually agreeable to the parties hereto determined by sound appraisal practices" makes the entire agreement patently void as illusory and indefinite. Restatement, Contracts § 32 (1932); Simpson, Handbook of the Law of Contracts, § 45 pages 69-71 (2d edition, St. Paul, 1965); 17 Am. Jur.2d, Contracts, § 26. Similarly, the provision with respect to entering into a contract "in substan-

tial accord with the conditions, restrictions, and limitations of a standard form of disposition contract as found in Federal Housing and Home Finance Agency Form H-6209 'Guide Form of Contract for Disposition of Land for Private Redevelopment' . . . ", also makes the entire agreement patently void as illusory and indefinite. Furthermore, this proposed contract was not in being at the time of the taking of the petitioner's property some six and one-half years later.

Since the Commission purported to act pursuant to this obviously illusory and void agreement for the very extended period of six and one-half years, it follows that they must be charged with knowledge and notice that this agreement was patently illusory and void.

Nevertheless, it is not necessary that they be charged with such knowledge and notice in order to find a deprivation of equal protection in this case. The court, in *Hobson* v. *Hobsen,* 269 F. Supp. 401, 497, stated:

> "Whatever the law was once, it is a testament to our maturing concept of equality that, with the help of the Supreme Court decisions in the last decade, we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."

In *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F.2d 920, 931, the court quoted from this statement in holding that the action of the redevelopment commission in that case could be a violation of equal protection.

B. Certiorari should be granted to decide whether it is a denial of substantive and procedural due process under the Fourteenth Amendment for a municipality to proceed to take title to real property and making improvements thereon while a suit is pending alleging the taking was for a private rather than a public purpose and in violation of the due process and equal protection clauses.

Section 8-129 of the Connecticut General Statutes provides, inter alia, that not less than twelve days nor more than ninety days after the Notice of Taking and Statement of Compensation have been served, and upon receipt of a Return of Notice filed by the agency, the Clerk of the Superior Court is authorized to issue a Certificate of Taking, and, upon the recording of such Certificate of Taking in the Town Clerk's Office, title to the property involved shall vest in fee simple in the municipality.

Under these circumstances, the property owner is remitted to an action in equity and is entitled to relief if he can sustain the burden of proving that the condemnation was one tainted by unreasonableness, bad faith or an abuse of the power confided to the condemnor or that the taking was for a private purpose or in violation of equal protection or due process.

The state court's denial of petitioner's request for an injunction restraining the vesting of title in the municipality deprived petitioner of an opportunity to test the lawfulness of the taking before title was taken from him, and thereby deprived him of the benefit of due process of law. The state court decision precluded the petitioner from effective resort to the only avenue of redress open to him on his claim that the taking was unlawful. Furthermore, it seems unreasonable that a citizen must hire counsel and petition

a court in a separate equity action in order to safeguard his property rights and title, rather than being afforded due process, to test the lawfulness of the taking, in the condemnation procedure itself.

Plaintiff recognizes that he is relegated to bringing an independent action to test the propriety of the condemnation. It is the plaintiff's position, however, that once the condemnee institutes an action to have a judicial review to discover if the taking was unreasonable, or in bad faith, or an abuse of the power conferred, or in violation of due process or equal protection, the "taking" should be stayed until this issue has been judicially determined. Inasmuch as the defendant city in this case was permitted to obtain fee simple title to the plaintiff's premises before such judicial determination, it is the petitioner's claim that the statute as applied by the defendant in this instance is unconstitutional and the "taking" illegal.

It is noteworthy that Connecticut General Statute Section 8-129 provides for a twelve-day waiting period between the date when the Commission files its Notice of Taking and Statement of Compensation (Lis Pendens) and the time when the Clerk of the Superior Court is authorized to issue a Certificate of Taking. Presumably, this twelve-day waiting period is afforded the property owner for the purpose of affording him time to commence an action for a full judicial review as to the correctness of the taking. The decision of the Supreme Court of the State of Connecticut in effect denies plaintiff this opportunity, necessarily implied by the provisions of the statute.

It is generally held that an actual or threatened illegal appropriation of or entry upon private land under color of

eminent domain, but without the institution of any proceedings to that end, will be restrained by a court of equity. *United States* v. *Central Eureka Mining Co.,* 357 U.S. 155; *Utah Power and Light Co.* v. *United States,* 253 U.S. 389. The equitable jurisdiction in such cases is based upon the attempted misuse of the power delegated, and the inequality of the parties by reason of the grant of a prerogative right to one of them. *Henry Ford & Son* v. *Little Falls Fibre Co.,* 280 U.S. 369. A state does not have the power to authorize the taking of the property of an individual without his consent for the private use of another, even on the payment of full compensation. *Cole* v. *La Grange,* 113 U.S. 1; *Wilkinson* v. *Leland,* 2 Pet. (U.S.) 627. It is, therefore, now well settled that the prohibition against the taking of property for public use without just compensation, impliedly, but definitely, forbids the taking of property for private uses. *North Carolina Pub. Serv. Co.* v. *Southern Power Co.* (CA 4), 282 F. 837, cert. dismd. 263 U.S. 508. Condemnation for a non-public use is held to be a denial of due process, even though accompanied by full compensation to the owner. *Cincinnati* v. *Vester* (CA 6), 33 F.2d 342, affd. 281 U.S. 439; *Madisonville Traction Co.* v. *St. Bernard Min. Co.,* 196 U.S. 239.

The institution of a lawsuit seeking the remedy of injunction and alleging that the taking of plaintiff's property was for a private rather than a public purpose and in violation of due process and equal protection, should have stayed the taking by the defendant herein, pending the determination of the allegations of the complaint. Failure to afford plaintiff the opportunity to test this issue before title to his property is irrevocably lost, constitutes a taking without due process of law in contravention of the Fourteenth Amendment of the United States Constitution.

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

JULIUS B. KURIANSKY
25 Bank Street
Stamford, Connecticut 06901
Attorney for Petitioner

April 2, 1970

APPENDIX A

Constitutional Provisions, Statutes and Regulations Cited

(Copy Connecticut General Statutes Section 8-129 and Section 8-137 as attached hereto)

(Copy Fourteenth Amendment of the Constitution of the United States as cited)

"Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws . . . "

§ 8-129. Agency to determine compensation and file with superior court and town clerks; notice to owners and interested parties. Possession of land. Certificate of taking

The redevelopment agency shall determine the compensation to be paid to the persons entitled thereto for such real property and shall file a statement of compensation, containing a description of the property to be taken and the names of all persons having a record interest therein and setting forth the amount of such compensation, and a deposit and bond, as provided in section 8-130, with the clerk of the superior court for the county in which the property affected is located. Upon filing such statement of compensation, deposit and bond, the redevelopment agency shall forthwith cause to be recorded, in the office of the

town clerk of each town in which the property is located, a copy of such statement of compensation, such recording to have the same effect as and to be treated the same as the recording of a lis pendens, and shall forthwith give notice, as hereinafter provided, to each person appearing of record as an owner of property affected thereby and to each person appearing of record as a holder of any mortgage, lien, assessment or other encumbrance on such property or interest therein (a), in the case of any such person found to be residing within this state, by causing a copy of such notice, with a copy of such statement of compensation, to be served upon each such person by a sheriff, his deputy or a constable or an indifferent person, in the manner set forth in section 52-57 for the service of civil process and (b), in the case of any such person who is a nonresident of this state at the time of the filing of such statement of compensation, deposit and bond or of any such person whose whereabouts or existence is unknown, by mailing to each such person a copy of such notice and of such statement of compensation, by registered or certified mail, directed to his last-known address, and by publishing such notice and such statement of compensation at least twice in a newspaper published in the county and having daily or weekly circulation in the town in which such property is located. Any such published notice shall state that it is notice to the widow or widower, heirs, representatives and creditors of the person holding such record interest, if such person is dead. If, after a reasonably diligent search, no last-known address can be found for any interested party, an affidavit stating such fact, and reciting the steps taken to locate such address, shall be filed with the clerk of the superior court and accepted in lieu of mailing to the last-known address.

Not less than twelve days nor more than ninety days after such notice and such statement of compensation have been so served or so mailed and first published, the redevelopment agency shall file with the clerk of the superior court a return of notice setting forth the notice given and, upon receipt of such return of notice, such clerk shall, without any delay or continuance of any kind, issue a certificate of taking setting forth the fact of such taking, a description of all the property so taken and the names of the owners and of all other persons having a record interest therein. The redevelopment agency shall cause such certificate of taking to be recorded in the office of the town clerk of each town in which such property is located. Upon the recording of such certificate, title to such property in fee simple shall vest in the municipality, and the right to just compensation shall vest in the persons entitled thereto. At any time after such certificate of taking has been so recorded, the redevelopment agency may repair, operate or insure such property and enter upon such property, and take whatever action is proposed with regard to such property by the project area redevelopment plan. The notice referred to above shall state (a) that not less than twelve days nor more than ninety days after service or mailing and first publication thereof, the redevelopment agency shall file, with the clerk of the superior court of the county in which such property is located, a return setting forth the notice given, (b) that upon receipt of such return such clerk shall issue a certificate for recording in the office of the town clerk of each town in which such property is located, (c) that upon the recording of such certificate, title to such property shall vest in the municipality, the right to just compensation shall vest in the persons entitled thereto and the redevelopment agency may repair, operate or insure

such property and enter upon such property and take whatever action may be proposed with regard thereto by the project area redevelopment plan and (d) that such notice shall bind the widow or widower, heirs, representatives and creditors of each person named therein who then or thereafter may be dead. When any redevelopment agency acting in behalf of any municipality has acquired or rented real property by purchase, lease, exchange or gift in accordance with the provisions of this section, or in exercising its right of eminent domain has filed a statement of compensation, deposit and bond with the clerk of the superior court and has caused a certificate of taking to be recorded in the office of the town clerk of each town in which such property is located as herein provided, any judge of such court may, upon application and proof of such acquisition or rental or such filing, deposit and bond and such recording, order such clerk to issue an execution commanding the sheriff of the county or his deputy to put such municipality and the redevelopment agency, as its agent, into peaceable possession of the property so acquired, rented or condemned. The provisions of this section shall not be limited in any way by the provisions of chapter 922. (1961, P.A. 231, § 1.)

§ 8-137. Transfer, sale or lease of real property in a redevelopment area

The redevelopment agency, for the purpose of this chapter, may sell or lease for such sums as are agreed upon the whole or any part of a redevelopment area to the redeveloper *or,* if the property is to be used for public purposes, to an appropriate public agency. The consideration paid for the sale or lease of the property shall be determined by the redevelopment agency, provided, if the cost or carry-

BLEED THROUGH POOR COPY

ing charges of such land to the redevelopment agency are greater than such consideration, the redevelopment agency shall first have specific authorization from the legislative body of the municipality for the sale or lease at any lesser consideration, and the municipality may appropriate and authorize the expenditure of money to compensate for any portion of the difference between the acquisition cost of such property and such sale or lease price of such property at a lesser consideration to a redeveloper, but in no case shall such sale or lease price be lower than the use value of such property. Each contract for sale or lease to a redeveloper shall provide, among other things, (a) that the property transferred shall be developed and used in accordance with the redevelopment plan or such plan as modified with the approval of the redevelopment agency; (b) that the building of the improvements shall begin within a period of time which the redevelopment agency fixes as reasonable; and (c) that all transfers of property by the redeveloper shall be subject to the consent of the redevelopment agency; except that the requirements of subdivisions (b) and (c) above may be waived by the redevelopment agency with respect to any bona fide mortgage placed upon the property by the redeveloper in order to obtain financing for the project. Any such mortgage, with the approval of the agency, shall be free of the requirements of said subdivisions (b) and (c). Any contract for sale or lease shall be approved by the legislative body before its final approval by the redevelopment agency. Any contract for sale or lease to a redeveloper may provide, among other things, (a) that the properties in the redevelopment area shall be maintained in accordance with the redevelopment plan; (b) that the redevelopment agency shall have the right of inspection; (c) that the redeveloper, as security for its ful-

fillment of the contract, shall make a cash deposit or give a bond with such surety as the contract may provide or make such other guarantee as the redevelopment agency deems necessary in the public interest; and that, if the redevelopment agency finds that the redevelopment is not being maintained in accordance with the contract terms and conditions, it shall notify the redeveloper or its successor in title in writing of the work which shall be done to meet the standards of maintenance agreed upon. Unless the redeveloper or its successor in title complies within ninety days with the requirements of the redevelopment agency as stated in such notice, the redevelopment agency may cause such work to be done, and the cost of the work shall be paid by the redevelopment agency out of the deposit herein provided for; and that, if a redevelopment agency, pursuant to this subsection, causes any work to be paid for out of such deposit, the redeveloper shall, within thirty days thereafter, pay an equivalent amount to the redevelopment agency in order to replenish the deposit; and that, if the redeveloper fails to make such payment within thirty days after being notified by the redevelopment agency to do so, it shall be liable to such agency in the penal sum of twice the amount of the cost of the work, which sum may be recovered in a civil action; (d) that any municipality may contract to retain or accept, close, relocate, construct, reconstruct and maintain specified streets, playgrounds, parks or other public facilities within the area of the proposed redevelopment. Upon consummation of the contract for sale or lease of a site to a redeveloper, any municipality may provide for the extension of such streets, sidewalks and public utilities as are necessary to its use for residential purposes. (1949 Rev., § 984; 1957, P.A. 13, § 55; 1957, P.A. 648.)

APPENDIX B

(Judgment and Proceedings Below)

Opinion of the Connecticut Supreme Court

STATE OF CONNECTICUT
SUPREME COURT

OCTOBER TERM, 1969

(Argued Decided December 3, 1969)

BROADRIVER, INC. *v.* CITY OF STAMFORD ET AL.

Action for an injunction restraining the defendants from proceeding with the condemnation of the plaintiff's land, for a judgment that the defendants have no right, title or interest in the plaintiff's land, for damages, and for other relief, brought to the Superior Court in Fairfield County at Stamford and tried to the court, *Sidor, J.;* judgment for the defendants and appeal by the plaintiff. *No error.*

Julius B. Kuriansky, for the appellant (plaintiff).

Robert M. Wechsler, with whom were *Cary L. Fleisher* and, on the brief, *Bernard Glazer,* for the appellees (defendants).

ALCORN, J. The plaintiff owns slightly less than a quarter of an acre of land which is on the periphery of a 130-acre redevelopment area in the center of Stamford. Situated on the plaintiff's land is an old frame barn and an unsightly former residence over seventy-five years old which has been converted to commercial uses. The buildings are substandard, and the most effective, highest and best use is not now being made of the property.

The plaintiff brought this action against the city of Stamford, the members of the Stamford redevelopment commission, hereinafter called the commission, and the clerk of the Superior Court at Stamford, seeking temporary and permanent injunctions and damages. The injunctions prayed for are to restrain the city and its redevelopment commission from condemning the plaintiff's property; to restrain them from filing further "condemnation papers" and to order them to release and withdraw those already filed; and to restrain the clerk of the Superior Court from issuing a certificate of taking. Judgment that the city and the "members" of the redevelopment commission have no interest in the plaintiff's property is sought.

The complaint, as amended, contains five counts. The first count, in substance, alleges that the city and its redevelopment commission acted capriciously and arbitrarily in taking the plaintiff's property for a private rather than a public use in order to attract sponsors for the redevelopment. The second count alleges that the city and its redevelopment commission had unnecesarily planned to take a segment of the plaintiff's land for street widening and that they incorrectly claimed that the remainder of the plaintiff's land would be narrow and economically unusable, a determination which should be left to the plaintiff. The third count alleges that the city and its redevelopment commission have deprived the plaintiff of due process by purporting to take the segment of land for street widening under the statutes relating to redevelopment rather than those relating to eminent domain. The fourth count alleges that the city and its redevelopment commission have caused loss to the plaintiff by disparaging the value of its land. The fifth count alleges that the defendants failed to meet

the requirements of General Statutes § 8-129 in order to accomplish a valid and constitutional taking of the plaintiff's property.

The original complaint, containing the first four counts was filed on August 23, 1966. Following a hearing in September, 1966, temporary injunctions were denied by the court. The fifth count was added to the complaint in April, 1967, and thereafter trial was had on the issue of a permanent injunction. The record and briefs disclose that the claim for damages was abandoned. The court found for the defendants on the remaining issues, and the plaintiff has appealed.

We turn our attention first to the plaintiff's attack on the procedure for the taking under General Statutes § 8-129. The pertinent part of the statute provides that the redevelopment agency shall file with the clerk of the Superior Court a statement setting forth a description of the property to be taken, the names of all persons having a record interest in it and the amount of compensation determined to be paid for it, with a deposit and bond; that it shall then cause a copy of the statement to be recorded with the town clerk of the town in which the land is located and give notice to each person appearing of record as an owner of, or an encumbrancer on, the property, the method of giving such notice being specified; and that "[n]ot less than twelve days nor more than ninety days after such notice and such statement of compensation have been so served or so mailed and first published" the redevelopment agency shall file with the clerk of the Superior Court a return setting forth the notice given, whereupon the clerk shall issue a certificate of taking which, upon its being recorded with the town clerk in the town where the land is situated, shall vest title

to the property in the municipality in fee simple and the right to just compensation shall vest in the persons entitled thereto.

The plaintiff claims, first, that the certificate of taking was not issued by the clerk of the Superior Court nor recorded in the town clerk's office in Stamford within the time required by the statute and, second, that the statute operates unconstitutionally in this case because the city was permitted to obtain title to the plaintiff's property by the issuance of a certificate of taking before the determination of the present action, which was brought to test the legality of the taking. In other words, the plaintiff makes the double-barreled claim that the certificate of taking was filed too late and too soon.

The finding of the court, which is not subject to correction, is that the commission filed a notice of taking and statement of compensation on July 14, 1966. On August 23, 1966, the complaint in the present action was filed. On December 20, 1966, the trial court, after hearing, denied the plaintiff's application for temporary injunctions, and on February 1, 1967, the clerk of the Superior Court issued a certificate of taking which was, on that day, recorded in the office of the town clerk in Stamford.

The plaintiff concedes that, as this court has held in *Bahr Corporation* v. *O'Brion,* 146 Conn. 237, 246, 149 A.2d 691, the statute (§ 8-129) is not unconstitutional because of any failure to provide for a judicial review of the validity of the taking. As we pointed out in that case (p. 247), the constitutional right to due process is protected by the plaintiff's privilege to seek relief by court action. The plaintiff availed itself of that privilege by bringing this action thirty-five days after the notice of taking and

statement of compensation was filed. The temporary relief requested was identical to the plaintiff's ultimate objective, namely, to restrain the city and the commission from taking the plaintiff's property and from filing any further "condemnation papers" and to restrain the clerk of the Superior Court from issuing a certificate of taking.

With that action pending the defendants properly refrained from taking any further steps under § 8-129 until the court had acted on the claim for temporary relief. In the event that the court should decide to grant the requested relief, the defendants, in all probability, would be enjoined, until the case should be finally determined, from doing those things which the statute required them to do. *Deming* v. *Bradstreet,* 85 Conn. 650, 659, 84 A. 116.

The plaintiff's application for a temporary injunction was fully heard by the court and was denied on December 20, 1966. The maximum period of ninety days within which § 8-129 required the filing of the return upon the basis of which the clerk was directed to issue the certificate of taking had then long since expired. The action of the court had, however, freed the defendants of the threat of restraint from proceeding as the statute required, pending the court's final decision on the ultimate issue. They were justified in interpreting the decision as a conclusion, by the court, that no such restraint was required in order to protect the rights of the parties during the pendency of the action. *Deming* v. *Bradstreet,* supra.

The denial of the temporary injunction nevertheless left the plaintiff free to obtain a full and final determination of the issues it had raised and, if successful, to obtain the relief sought regardless of what, if any, action the defendants might see fit to take in the interim. *Industrial Bank*

of Washington v. *Tobriner*, 405 F.2d 1321, 1323 (D.C. Cir.); *Ramsburg* v. *American Investment Co. of Illinois*, 231 F.2d 333, 336 (7th Cir.); *Turney* v. *Shriver*, 269 Ill. 164, 172, 109 N.E. 708; 42 Am. Jur. 2d, Injunctions, § 318. At the same time, the defendants would, as the cases cited indicate, act at their peril if they undertook to do any act which the plaintiff sought to enjoin. The court's power to restore the status quo or to grant such other relief as might be proper remained unaffected by the disposition made of the temporary injunction. See *Jones* v. *Securities & Exchange Commission*, 298 U.S. 1, 17, 18, 56 S. Ct. 654, 80 L. Ed. 1015; *Texas & N.O.R. Co.* v. *Northside Belt Ry. Co.*, 276 U.S. 475, 479, 48 S. Ct. 361, 72 L. Ed. 661; 42 Am. Jur. 2d, Injunctions, § 16. Consequently, the plaintiff's rights were fully protected, the issuance of a certificate of taking notwithstanding.

Under those circumstances, the defendants continued with the procedures required by General Statutes § 8-129 and, without unreasonable delay, on February 1, 1967, the certificate of taking was issued by the clerk. We have said that strict compliance with the steps enumerated by statute is essential to the validity of proceedings for the adoption of a redevelopment plan. *Sheehan* v. *Altschuler*, 148 Conn. 517, 523, 172 A.2d 897. We were discussing, in that case, the requirement laid down by § 8-127 for a public hearing before a redevelopment plan could be adopted, or, in other words, action which was basic to the objective to be accomplished.

The most satisfactory test of whether a statute is mandatory or merely directory "is whether the prescribed mode of action is of the essence of the thing to be accomplished, or in other words whether it relates to a matter of sub-

stance or to matter of convenience." *International Brotherhood of Teamsters* v. *Shapiro,* 138 Conn. 57, 68, 82 A.2d 345; *Gallup* v. *Smith,* 59 Conn. 354, 358, 22 A. 334. Where the thing required to be done is one of substance the statutory provision is mandatory. *State ex rel. Eastern Color Printing Co.* v. *Jenks,* 150 Conn. 444, 451, 190 A.2d 591; *Blake* v. *Meyer,* 145 Conn. 612, 616, 145 A.2d 584. However, "[l]egislative provisions designed to secure order, system and dispatch in proceedings are ordinarily held to be directory where, as here, they are stated in affirmative terms or, to express it differently, are unaccompanied by negative words." *Winslow* v. *Zoning Board,* 143 Conn. 381, 388, 122 A.2d 789. Such a statutory provision is one which prescribes what shall be done but does not invalidate action upon a failure to comply. *Nielsen* v. *Board of Appeals on Zoning,* 129 Conn. 285, 287, 27 A.2d 392; see *Wilson Point Property Owners Assn.* v. *Connecticut Light & Power Co.,* 145 Conn. 243, 266, 140 A.2d 874.

The obvious purpose of the ninety-days requirement in § 8-129 is to guard against the harm which could result to a property owner from an unreasonable delay between the notice of taking and the actual taking. The statute contains nothing to invalidate a belated title transfer or which inferentially makes compliance with the time requirement a condition precedent. *International Brotherhood of Teamsters* v. *Shapiro,* supra. Section 8-129 provides that, upon issuance of the certificate of taking by the clerk, title shall vest in the municipality, and the right to compensation shall vest in the property owner. The time fixed by the statute within which the return of notice shall be filed is "designed to secure order, system and dispatch", *Winslow* v. *Zoning Board,* supra, in defining when title shall pass and

when the property owner's right to compensation shall mature. Under the circumstances disclosed, strict compliance with the time requirement was not required in order to accomplish a valid taking of the plaintiff's property.

The plaintiff would have us hold that, by deferring action under § 8-129 pending the decision of the court on the temporary injunction until too late for strict compliance with the mandate of the statute, the municipality has lost any right to acquire the property. Such a construction of the statute would permit any objecting condemnee to defeat a taking under § 8-129 by the simple expedient of an application for injunctive relief sufficiently prolonged unless the condemnor, at its peril, chose to act in the face of the threat of a restraining order. Under the plaintiff's theory, once the time limit fixed in the statute had passed, and even though the case had not been reached for hearing even on an application for a temporary injunction, the condemnee would have attained his ultimate objective without the necessity of a final hearing on the main issue because the condemnor's right to acquire the property already would have been defeated. Where, as in this case, the property owner has initiated action designed to defeat the taking, that action should not be allowed to accomplish an anomalous result. The plaintiff gains nothing by its attack on the procedure under § 8-129.

The numerous other claims of the plaintiff all concentrate basically on the proposition that, for various reasons, the action of the redevelopment commission in taking the plaintiff's property as part of the redevelopment plan was unreasonable, taken in bad faith and amounted to an abuse of the power conferred upon it. In support of these claims it is argued that the plaintiff's property was, in reality,

taken for a private purpose through the unjustified reliance, by the commission, on an unenforceable and sham contract utilized to permit preselected redevelopers to control decisions which the commission should have made; and that the commission illegally designated certain properties, including the plaintiff's, within the redevelopment area for condemnation while permitting others to be developed to conservation standards by the existing owners.

The commission is invested with broad powers to carry out urban renewal projects including the acquisition of property and reconstruction of streets; General Statutes § 8-141; and plans for carrying out the demolition or the voluntary rehabilitation of buildings. § 8-143; *Graham* v. *Houlihan*, 147 Conn. 321, 328, 160 A.2d 745, cert. denied, 364 U.S. 833, 81 S. Ct. 70, 5 L. Ed. 2d 57. In addition to the facts already recited, the court has found that, following a study of the area to be included in the downtown redevelopment area, the commission adopted a plan for the redevelopment of the central core of the city of Stamford in order to eliminate blight and deterioration in the downtown area and provide an environment conducive to the full economic and social potential of the area. The plan as originally conceived did not include the plaintiff's land. The plaintiff's property, however, is on the corner of Broad and River Streets, a strategic corner of the redevelopment area and one of the most heavily traveled areas in the city. The corner has been one of the most dangerous in Stamford. In February, 1963, an extended development plan, which included the plaintiff's property, was adopted by the commission, as permitted by General Statutes § 8-136, and was approved by the Stamford board of representatives, the federal government, and the Stamford planning board.

Directly across Broad Street from the plaintiff's property is the Bloomingdale Department Store complex, which although not geographically in the redevelopment area is nevertheless a factor of major importance to the redevelopment. The redevelopment plan contemplated a main traffic loop, of which Broad and River Streets would form a part, around the redevelopment area. Construction of this loop required a widening and improvement of Broad and River Streets. The commission determined that 3600 square feet of the plaintiff's property was necessary to be taken for the widening and realignment of this intersection. The remainder of the plaintiff's property is an inadequate unit of development by itself because of its size and location, and the commission planned to combine it, for disposition, with another parcel. The commission's plan was to acquire certain of the properties within the redevelopment area, including the plaintiff's, and to allow others to remain in private ownership subject to being brought to conservation standards. The plaintiff's property is vital to the plan because it serves as a connection between the Bloomingdale complex and the redevelopment area.

The plaintiff makes no claim that the commission had not determined, legally and in good faith, the total area of redevelopment. Nor does it contend that its own property was not a fit subject for development. On the contrary, the court has found that, for over twenty years, the plaintiff had recognized the need for improving its property but had done nothing about it. The basic assertion is that the plaintiff should be permitted to improve its property to acceptable standards itself, as some other owners in the redevelopment area are permitted to do, rather than to have it taken by the commission and transferred to others for re-

development. No facts appear which would indicate that the commission had acted unreasonably or in a discriminatory manner in deciding to acquire the plaintiff's property. Looming large in the plaintiff's contention, however, is the claim that the commission has purported to contract with redevelopers for the property but that the purported contract is nothing more than an illusory and void instrument designed to favor the private interests of the redevelopers.

It is well settled that the determination of what property is necessary to be taken in order to effectuate the public purpose of the redevelopment rested with the commission subject to proper review by the court. *Gohld Realty Co.* v. *Hartford,* 141 Conn. 135, 147, 104 A.2d 365. And where the public use which justifies the taking of the area in the first instance exists, an element over which there is no controversy in the present case, that same public purpose continues even though the property is later transferred to private persons. Id., 143. Although the plaintiff's concern is for its own parcel within the redevelopment area, the commission's responsibility was to consider conditions existing in the entire area including such matters as street layouts and the relation and significance of the plaintiff's property to the entire area. *Pet Car Products, Inc.* v. *Barnett,* 150 Conn. 42, 52, 184 A.2d 797.

It is unnecessary to elaborate upon the details of the contract between the commission and the redeveloper which the plaintiff claims is illusory and void. It is sufficient to say that a lengthy instrument had been executed between the commission and Seon Pierre Bonan and the F. D. Rich Company, Inc., as redevelopers, which the commission asserts to be a valid and binding contract looking to the performance, by the redevelopers, of various preliminary obligations and the ultimate purchase, for redevelopment, of properties ac-

quired by the commission. The plaintiff attempts to show that it was denied the right to improve its property, instead of having it taken, only because the commission conditioned the plaintiff's exercise of that right solely on the consent of the redeveloper to which the commission considered itself bound by the allegedly void contract.

The short answer to that contention is that, regardless of whether the contract was or was not binding, the plaintiff has failed to show that the commission has acted as the plaintiff claims. Any action by the commission required a majority vote of its members. General Statutes § 8-126. From the evidence before it, the court has found that the president of the plaintiff corporation met with the chairman of the commission, the plaintiff's attorney and two men whose connection with the controversy does not appear. The meeting was requested by the plaintiff's attorney and, at it, the plaintiff's president "maintained that he was prepared to develop" the portion of the property not needed for the street improvement either as one piece or in combination with other property in the redevelopment area. He was told by someone at the meeting, but the identity of his informant does not appear, that "the land in the project for private development" was to be offered first to the redeveloper under "an agreement." Either the chairman of the commission or one of the unidentified men at the meeting suggested that the plaintiff's president attempt to agree with the redeveloper that, either alone or in conjunction with the redeveloper, the plaintiff might develop its property and that if such agreement was reached it would be recommended to the commission. No one at the meeting had any authority to bind the commission, and the plaintiff's president was unable to agree with the redeveloper.

There is nothing in the foregoing which can be tortured into a finding that the commission itself did anything in this episode, either in reliance on any contract or otherwise. The most which can be gleaned from it is that the plaintiff was extended a courtesy which its situation did not demand. The court concluded that, in taking the plaintiff's property, and in all other aspects of the redevelopment procedures attacked by the plaintiff, the commission did not act unreasonably, in bad faith or by abusing the powers conferred on it. The subordinate facts found, which are not subject to correction, support those conclusions.

There is no error.

In this opinion the other judges concurred.

FILE COPY

FILED
MAY 13 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1425

BROADRIVER, INCORPORATED,

Petitioner,

—v.—

CITY OF STAMFORD, *et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT M. WECHSLER
750 Summer Street
Stamford, Connecticut 06901
Attorney for Respondent

INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Additional Statutes and Practice Book Rules 2

Statement of the Case 2

ARGUMENT:

I. Petitioner should not be allowed to raise questions not raised below 6

II. Petitioner's claims are foreclosed by prior decisions 9

III. The taking of Petitioner's property during the pendency of suit is constitutional 12

CONCLUSION 15

APPENDIX A—Additional Statutes and Connecticut Practice Book Rules Cited 17

TABLE OF AUTHORITIES CITED

Cases:

Amalgamated Ford Employee's Union v. Logan Valley Plan, 391 U.S. 308 (1968) 6

Berman v. Parker, 348 U.S. 26 (1954) 5, 7, 9, 10, 12

PAGE

Buck v. Morris Park, Inc., 153 Conn. 290, appeal dismissed, 385 U.S. 2 (1965) 13

Ewing v. Mytinger & Casselberry, 339 U.S. 594, rehearing denied, 340 U.S. 857 (1950) 13

Jones v. SEC, 298 U.S. 1 (1935) 14

Maier v. Arsenault, 140 Conn. 364 (1953) 6

Norwalk Core v. Norwalk Redevelopment Agency, 395 F.2d 920 (1968) 11, 12

Ramsburg v. American Investment Co. of Ill., 231 F.2d 333 (1956) 14

Yakus v. U.S., 321 U.S. 414 (1944) 13

Statutes:

Conn. Gen. Stats. §8-125 (Rev. 1958) 2, 10
Conn. Gen. Stats. §8-129 (Rev. 1958) 8, 12
Conn. Gen. Stats. §8-137 (Rev. 1958) 10

Miscellaneous:

Connecticut Practice Book §223 (1963) 2, 6
Rules of the Supreme Court of the United States, Rule 23.1(f) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1425

BROADRIVER, INCORPORATED,

Petitioner,

—v.—

CITY OF STAMFORD, *et al.*,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The statement of the Opinions Below is adequately set forth in the Petition.

Jurisdiction

The Connecticut Supreme Court entered judgment on December 3, 1969, and the decision was announced on December 23, 1969. Petitioner's motion to reargue was denied on January 15, 1970.

This Court has no jurisdiction under 28 U.S.C. §1257(3) where a substantial federal question was not properly raised in the Connecticut Supreme Court proceedings below.

Questions Presented

1. Where Petitioner owned property containing less than one-quarter acre of land on which stood an admittedly substandard structure, in a total redevelopment project area encompassing 130 acres, and the redevelopment plan provided for Petitioner's property to be combined with additional property taken for redevelopment, was the Petitioner denied due process and equal protection of law because the property was to be redeveloped by a private individual other than Petitioner, even though Petitioner was willing, after the redevelopment plan was adopted, to redevelop his own property?

2. Was Petitioner denied due process when Respondent, acting at its peril, acquired title to Petitioner's property after Petitioner brought suit in the Connecticut Courts to restrain the taking of its property and, after a lengthy hearing, Petitioner's request for a temporary injunction was denied?

Additional Statutes and Practice Book Rules

Section 8-125, Connecticut General Statutes revision of 1958 printed in pertinent part in the Appendix, *infra*, p. 17.

Connecticut Practice Book 1963, §223, printed in the Appendix, *infra*, p. 17.

Statement of the Case

This case involves an action by a property owner of property in a validily constituted redevelopment area to enjoin the taking of its property.

The property involved is less than one-quarter acre in size and contains a substandard structure. The property is being acquired pursuant to an Urban Redevelopment plan for the City of Stamford which was adopted by the City in 1963. On July 14, 1966, the Urban Redevelopment Commission served the necessary papers upon the property owner to institute the proceedings by which the property was being condemned. Shortly thereafter, this injunction action to restrain the taking was started before any further steps had been taken to complete the acquisition of the property.

The Findings of the Trial Court indicate that this property was one of 424 structures in the redevelopment area to be demolished, the redevelopment area encompassing 130 acres.

Numerous reasons for the taking of this property may be found in the Finding of the Trial Court.

The property in question will be used in part for a new traffic artery and will be redeveloped in connection with other adjacent properties to connect the redevelopment area with an existing shopping complex; additionally, combination of this property with other properties will avoid multiple driveway accesses onto the new major thoroughfare.

On January 27, 1960 the URC entered into an agreement with Seon Pierre Bonan and the F. D. Rich Co., Inc., the so-called pre-selected sponsors of the redevelopment project.

In May of 1966 there was a meeting attended by Dr. Koffler, president of Petitioner corporation; Mr. Sydney Kweskin; Mrs. Dwight Marshall, chairman of the URC;

Mr. McCullough and Mr. Eugene Jones. This meeting was requested by Petitioner's attorney who indicated that Petitioner was determined to proceed with litigation to retain its property. At the meeting the reasons for the taking of Petitioner's property were explained. When Dr. Koffler suggested letting Petitioner redevelop its own property he was told that the property had to be developed as a unit and that further, the land in the project area for private development was to be first offered to the sponsor under an agreement with the sponsor. Although some discussion took place regarding a possible joint venture with the sponsor and a meeting with the sponsor was suggested by either Mr. McCullough or Mrs. Marshall, neither had authority to bind the commission at this meeting. However, a meeting with the sponsor did take place which proved unfruitful.

After the institution of the within lawsuit a hearing on a temporary injunction was held and said injunction was denied. Thereafter the permanent injunction was denied after a hearing and the Supreme Court of Connecticut affirmed the decision below.

Argument

Regardless of how vigorously Petitioner argues that the present controversy presents new and vital constitutional questions, and regardless of the vast amount of dollars being spent on Urban Renewal in the United States today, this case does not warrant review by this Court on certiorari.

When trimmed down to its essence, this case involves the claim by a property owner whose property was taken

for urban redevelopment, that it is unconstitutional to allow a private redeveloper, other than Petitioner. to redevelop its property.

To discover the exact nature of the attack being made by Petitioner, this Court should not lose sight of the facts found by the Trial Court, unchallenged by Petitioner, that for twenty years Petitioner recognized the necessity for redevelopment of its property, but did nothing but let the property decline to a point where redevelopment was necessary. Now after a redevelopment plan is adopted, financing and a redeveloper obtained, Petitioner makes a claim that " . . . equal protection required that petitioner be given the opportunity to develop its own land" (Petition, p. 8) and that to allow a private redeveloper other than itself to develop the property is a taking for a private rather than public use.

Interestingly, there is no authority cited by Petitioner in its petition to support the proposition that equal protection requires that it be given the opportunity to develop its own property. In fact, this Court has decided the issue against Petitioner in the landmark case of *Berman* v. *Parker,* 348 U.S. 26 (1954).

The secondary issue raised in the petition questions the procedure of the Respondent in acquiring Petitioner's property, after a full hearing denying a temporary injunction against the taking of the property, but before the judgment of the trial court denying the permanent injunction.

Both issues Petitioner now seeks to have reviewed have already been decided by this Court.

I.

Petitioner should not be allowed to raise questions not raised below.

It is a basic tenet that the federal question sought to be put before the Supreme Court by virtue of a Writ of Certiorari must be timely raised in the State Court, and at a point considered appropriate under state procedure. Failure to do so is jurisdictional. *Amalgamated Ford Employee's Union* v. *Logan Valley Plan,* 391 U.S. 308, 334 (1968) (dissent).

In Connecticut there is a clear cut requirement that all claims of law be made in writing at the Trial Court. Conn. Pr. Bk. §223 (1963).

If the claim is not made in the Trial Court, the Connecticut Supreme Court is not required to consider such claim. *Maier* v. *Arsenault,* 140 Conn. 364, 370 (1953).

In the present case a review of the record reveals that the questions Petitioner seeks to have reviewed were not raised in the Trial Court, were not urged upon the Supreme Court of Connecticut and, therefore, were not considered by said Court.

Petitioner's first claim in his petition is that it was denied due process and equal protection of law by virtue of the disposition of its property by the Commission to a private redeveloper, as opposed to a claim that its very acquisition by the Commission was unconstitutional.

A careful review of the claims made before the Trial Court reveals that no such claim was then made. The only claim of a denial of a constitutional right in the Trial Court was that "the proposed *taking* of a portion of all of the plaintiff's property constitute[d] a violation of plaintiff's constitutional rights." (Emphasis added.) Petitioner cannot now seriously contend that its claim that the acquisition of its property was unconstitutional encompasses a right of review as to its ultimate disposition. The former does not include the latter and the latter cannot be reviewed at so late a date.

Even if Petitioner's argument, strained to its utmost, can be read as questioning the legality of the acquisition of its property, the decision to acquire cannot be reviewed by this Court. It is within the sound discretion of a redevelopment agency to decide which properties are to be acquired and included in a redevelopment plan.

> "It is not for the courts to oversee the choice of the boundary line nor to sit in review on the size of a particular project area. Once the question of the public purpose has been decided the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." *Berman* v. *Parker*, 348 U.S. 26, 35-36 (1954).

Furthermore, Petitioner claims that it was denied the protections of the Fourteenth Amendment by virtue of the taking of its property during the pendency of a suit brought to enjoin such taking. No claim is made in the Petition as to the constitutionality of the statutes authorizing the taking. The question raised is confined and limited to the

validity of the taking of Petitioner's property after the denial of a temporary injunction seeking to enjoin the taking but prior to a hearing on a permanent injunction. A search of the record reveals that no such claim was made to the Trial Court.

The only issue as framed below and as urged upon the Trial Court questioned the validity of §8-129 of the Connecticut General Statutes in so far as it provided Petitioner no opportunity to test the reasonableness of the taking in a statutory proceeding (R. 144, p. 43).[1] Not only has this claim been abandoned in the petition, but Petitioner now concedes the validity of §8-129 of the Connecticut General Statutes and argues for the first time that the action of the Commission in proceeding in due course to take its property, which action as will be clearly indicated herein was at its peril, was unconstitutional.

When claims made at such late dates are urged upon this Court, this Court lacks jurisdiction to entertain them.

Further evidence to support Respondent in its claim that no federal questions were raised below may be found in Petitioner's failure to comply with Rule 23.1.(f) of the Rules of the Supreme Court of the United States.

---

[1] The designation above used refers to the official printed record of the Supreme Court of Connecticut, which record has been certified to this Court.

II.

Petitioner's claims are foreclosed by prior decisions.

The City of Stamford Urban Redevelopment Commission need not rely upon the fact that there is no federal question to be reviewed. Even if the issue were raised at the Trial Court and there were jurisdiction for this Court to review, the decision of the Connecticut Court in this case is in accordance with prior decisions of this Court.

The issue, raised by Petitioner for the first time in the Petition, questions the right to have the property acquired by the Commission and redeveloped by a private developer.

In *Berman* v. *Parker*, 348 U.S. 26 (1954), this Court considered a property owner's complaint that their property may not be constitutionally taken, because it was to be put under the management of a private and not public agency. No answer to this question could be given in better language than the language of this Court itself.

> ". . . Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. . . . The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the

> Congress might conclude. We cannot say that public ownership is the sole method of promoting the public purposes of community redevelopment projects. What we have said also disposes of any contention concerning the fact that certain property owners in the area may be permitted to repurchase their properties for redevelopment in harmony with the over-all plan. That, too, is a legitimate means which Congress and its agencies may adopt, if they choose." (Citations omitted.) (*Berman* v. *Parker, supra,* at 33-34.)

The above quotation indicates that even where preference is given to some property owners whose property is taken for redevelopment to repurchase the property and redevelop it that equal protection has not been violated. Clearly, the case at bar does not violate the equal protection clause of the Constitution under the facts of this case.

In the present case, as in the *Berman* case, there is legislative authority given to the Commission to dispose of property to a private redeveloper. The General Statutes of Connecticut authorize the sale of the "whole or any part of a redevelopment area to the redeveloper," Conn. Gen. Stats., §8-137 (Rev. 1958), which redeveloper may be an "individual, group of individuals or corporation," Conn. Gen. Stats. §8-125(e) (Rev. 1958).

Mr. Justice Douglas, speaking for a unanimous Court in *Berman,* points out that what is involved in cases such as this is an exercise of the police power, which is a legislative concern over which the states have the right to set the guidelines for local affairs. *Berman* v. *Parker, supra,* at 32.

The singular factual difference between this case and *Berman* is in Petitioner's claims that the 1960 agreement,

with the sponsors, which provides that the Petitioner's property is to be redeveloped by them, denies it of equal protection of the law. This claim lacks merit.

The fact that an agreement was entered into with the sponsors in 1960 giving them rights as to redevelopment of property within the redevelopment area has no bearing on this case. Such a determination by the local Commission is administrative, and Petitioner has no greater rights as regards this decision than it does over the legislative determination that redevelopment property acquired from one private individual may be sold to a different private individual.

Moreover, the contract issue does not really raise any new or novel question. It relates merely to the mechanics by which the property is to be conveyed. Petitioner's claim herein raises the same issues, notwithstanding the contract. It is the disposition to a private individual other than itself of which Petitioner complains, not the fact that it was done pursuant to a contract.

Petitioner's reliance on the case of *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F.2d 920 (1968) is misplaced. In the first instance that case holds only that the pleadings therein were sufficient to allege a violation of equal protection and due process so that the action should not have been summarily dismissed. Additionally, the *Norwalk Core* case cannot be taken out of context and applied to every case wherein a denial of equal protection of the law is claimed.

> "We cannot doubt the necessity of discretionary decision making in urban renewal planning. This necessity would render unfit for judicial decision many

questions concerning urban renewal. See Baker v. Carr, 369 U.S. 186, 217, 82 S. Ct. 691, 7 L. Ed. 663 (1962); cf. Berman v. Parker, 348 U.S. 26, 33, 75 S. Ct. 98, 99 L. Ed. 27 (1954). This does not mean, however, that every case or controversy touching this area lies beyond judicial cognizance. Case-by-case inquiry is necessary, with due regard for the need for judicially discoverable and manageable standards for resolving problems to be undertaken, and with recognition of the role played by the coordinate branches of the Federal Government in the planning and implementation of urban renewal. See Baker v. Carr, supra, 369 U.S. at 208-217, 82 S. Ct. at 691."

The *Norwalk Core* decision has no bearing on the constitutionality of a sale of property to a private redeveloper, and has no effect on the decision of *Berman* v. *Parker, supra.*

III.

The taking of Petitioner's property during the pendency of suit is constitutional.

At the outset, it is important to note that Petitioner does not challenge the constitutionality of §8-129 of the Connecticut General Statutes, which section provides for the procedural steps which must be followed by a redevelopment agency in acquiring a property in private ownership. Petitioner's argument goes further. In essence, Petitioner claims, that even though the above mentioned statute is constitutional, it has been denied due process by virtue of the Commission's acquisition of its property

pursuant to this statute, during the pendency of an injunction action brought by Petitioner to test the legality of the taking.

Petitioner alludes to the fact that the above mentioned statute is unconstitutional because a separate action must be instituted to protect its property rights instead of being able to raise the issue in the condemnation action.

The very fact the Petitioner must bring an independent action does not make the statute unconstitutional. Petitioner is protected by his privilege to apply to a Court and be heard. *Ewing* v. *Mytinger & Casselberry,* 339 U.S. 594, *rehearing denied,* 340 U.S. 857 (1950); *Buck* v. *Morris Park, Inc.,* 153 Conn. 290, *appeal dismissed,* 385 U.S. 2 (1965); *see, Yakus* v. *U.S.,* 321 U.S. 414 (1944).

Interestingly, in the petition itself Petitioner now concedes that it is relegated to bringing such independent action (Petition, p. 13).

Moreover, the facts in this case clearly indicate that Petitioner's rights have in fact been protected. The original lawsuit was brought to enjoin the taking of property before title was acquired by the commission. A full and adequate hearing on the merits was held by the Court on Petitioner's claim for a temporary injunction. Only after the Petitioner failed to show that even a temporary injunction should be granted was the property in fact acquired.

Petitioner's basic complaint is that the acquisition of its property during the pendency of its injunction action challenging the legality of the taking was unconstitutional. Petitioner claims to have irretrievably lost title to his property by virtue of this taking.

The fallacy of Petitioner's argument is apparent. This court has uniformly held that a party against whom an injunction is sought restraining it from acting in a specified manner may do the act against which the injunction is sought. If it be so done, the party acts at its peril and on the rendering of an adverse decision, the Court has the power and duty to restore the *status quo*. *Jones* v. *Securi-* power and duty to restore the *status quo*. *Jones* v. *SEC*, 298 U.S. 1 (1935); *Ramsburg* v. *American Investment Co. of Ill.*, 231 F.2d 333 (1956).

If Petitioner's argument were adopted, property owners similarly situated would have the awesome power of stifling any effort by a municipality to carry out its large scale redevelopment projects which have become the order of the day. Every property owner would have the power to bring an injunction action challenging the reasonableness of the taking as to himself and have any takings stayed until a final determination were made. Due Process and Equal Protection involves a proper balancing of equities and requires that the prior holdings of this Court be followed.

The argument of Petitioner that "title to his property is irretrievably lost" by the denial of a stay pending a determination on a permanent injunction, is simply not true. As can be seen by application of the above mentioned principle, Petitioner has lost nothing by the issuance of a Certificate of Taking during the pendency of its injunction proceeding. If Petitioner were successful in enjoining the taking, the Court would be duty-bound to restore Petitioner to the *status quo*. If Petitioner were denied an injunction, then, and only then, would Petitioner have "irretrievably lost" his property; and then only after a

full hearing as required by due process of law. This in fact was the holding of the Supreme Court of Connecticut (Petition, p. 28).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT M. WECHSLER
750 Summer Street
Stamford, Connecticut 06901
Attorney for Respondent

May 11, 1970

BLEED THROUGH POOR COPY

APPENDIX A

Additional Statutes and Connecticut Practice Book Rules Cited

§ 8-125. Definitions

As used in this chapter: * * * (e) "redeveloper" means any individual, group of individuals or corporation or any municipality or other public agency including any housing authority established pursuant to chapter 128. (1949 Rev., § 979; 1953, 1955, Supp. § 484d; 1957, P.A. 13, § 51; 1959, P.A. 397, § 2.)

Sec. 223. Raising Questions of Law

In trials to the court, if counsel intends to raise any question of law which may be the subject of an appeal to the supreme court of errors, he must state the same distinctly to the court before his argument is closed, and in such time as to give the opposing counsel an opportunity to discuss the question, and must request the court to take note of the point. If this be omitted, it will not be the duty of the court to decide the question. Counsel shall present the questions of law in writing, unless the exigencies of the case render this impracticable. (P.B. 1951, Sec. 154.)